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Supreme Court, U.S.
FILED
JUN 6 - 2005
OFFICE OF THE CLERK

No. 04-1152

In the
Supreme Court of the United States

DONALD H. RUMSFELD,
Secretary of Defense, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND
INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND IN SUPPORT OF REVERSAL

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Interest of *Amici Curiae*

Amici are three groups interested in furthering academic freedom on law school campuses, and halting the imposition by law school administrations and faculty of what they believe to be politically-correct views on each and every student, who should have the academic freedom to decide for themselves what they wish to hear and accept. The three *Amici* groups are as follows:

1. The Center for Individual Rights ("CIR") is a non-profit public interest law firm, founded in 1989 to provide free legal representation to deserving clients who cannot otherwise afford legal counsel. CIR regularly represents students and professors whose First Amendment rights are infringed by the administrations of higher education institutions. CIR is dedicated to enhancing academic freedom and opposing the imposition on students of college administrations' views as to what is correct thinking.

2. Students at various law schools,[1] who are deeply concerned that the decision below is inconsistent with their academic freedom to hear expressions of view and offers of employment without restrictions imposed by the views of the law school administration and faculty.

3. A group of veterans who served our country in the military forces and received this nation's highest military honor, the Medal of Honor, for, as exemplified in one citation, "conspicuous gallantry and intrepidity in action at the risk of his life above and beyond the call of duty" and thereby "saved the lives of 1 U.S. advisor and 13 allied soldiers," while "single-handedly killing 3 and wounding

[1] These students attend the following law schools: American; Arizona State; Ave Maria; Brooklyn; Cardozo; Case Western; Catholic; Chicago-Kent; Columbia; Cornell; Emory; Georgia State; George Washington; Harvard; Hawaii; Idaho; Illinois; Indiana; Kansas; New Mexico; New York; North Dakota; Oklahoma; Oklahoma City; Pepperdine; Richmond; Rutgers; San Francisco; Seton Hall; SMU-Dedman; South Carolina; South Dakota; Southern California; Texas Tech; Texas Wesleyan; Thomas Cooley-Lansing; Toledo; Utah; Vermont; Villanova; Virginia; Wake Forest; Washburn; Western New England; and Whittier.

several others" of the enemy, during his service in Vietnam. They seek to file this brief because they believe that not allowing equal access to the military to be heard by students who wish to hear that employment viewpoint makes a mockery of basic freedom principles of this country for which they and their colleagues fought and, as to many, gave their lives.

Counsel for all parties have consented to the filing of this brief.

Summary

The court below held unconstitutional the Solomon Amendment on the ground that the free speech and association rights of law schools, faculty members, and some students -- commonly known as academic freedom -- have been violated by the federal government's conditioning of federal funds on granting military recruiters access to students, who wish to interview with the military, equal to that granted to all other interviewing employers.

In upholding plaintiffs' right to prevent students who wish to hear what the military has to say, the court below has misused the important campus right of academic freedom. In an edict reminiscent of double-think in Orwell's *1984*, the decision below asserts that it is enforcing academic freedom by preventing all students -- the primary beneficiaries of academic freedom -- from exercising their First Amendment right to listen, on campus, to the message of the military. The right of freedom of association, on which respondents and the court below rely, does not provide a right to deny others their right to associate and hear the military message. The Solomon Amendment does not violate any First Amendment right of law schools, faculty and students because they remain free to decline federal funds or, as an alternative, accept those funds while expressing their opposition to military policy. And allowing military recruiters on campus to the same extent as all other recruiters does not communicate an endorsement of the military, just as

no endorsement is communicated of any or all civilian recruiters provided access to the campus.

Therefore, because the Solomon Amendment does not condition the grant of federal funds on any unreasonable restriction of First Amendment rights, it should not have been held unconstitutional. If any infringement is involved, it is minimal and incidental and thus does not overcome the Government's right to condition the grant of federal funds on the acceptance of a condition furthering an important Governmental policy -- military recruitment.[2]

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[2] It is significant that, while respondents assert the military's violation of the law schools' policy against discrimination, they focus only on sexual orientation discrimination. In fact, the military "discriminates" against applicants on the basis of age (maximum 34 years old for active duty and 39 for reserve duty) and disability (must be able bodied), both of which are precluded by the law school's policy. This suggests that respondents recognize the military's right to fix requirements for employment consistent with the military's judgment, but are merely using this lawsuit to cause a revocation of the don't-ask-don't-tell policy. *Amici* take no position on that issue, but believe that the proper forum for that goal is Congress, which enacted that policy (10 U.S.C. § 654), not the courts.

Argument

This Court has repeatedly held that Congress has "wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *United States v. American Library Ass'n Inc.*, 539 U.S. 194, 203 (2003). See also, *e.g.*, *National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998). Invoking this rule, Congress enacted the Solomon Amendment, 10 U.S.C. § 983(b), which conditions the grant of federal funds to any institution of higher education on allowing, or allowing equal access to, military recruiters for the purpose of informing students who wish to hear of the benefits of employment in the military. That conditioning of all federal funds on non-discrimination against military recruiters in access to employment services of the grantee university is similar to the conditioning of all federal funds on "[non-]discrimination . . . in the availability or use of any academic . . . or other

facilities of the grantee," upheld by a unanimous Court in *Lau v. Nichols*, 414 U.S. 563, 567-68 (1974).[3]

The Constitution and prior decisions by this Court have made clear that military recruitment -- the policy objective of the Solomon Amendment -- is a fundamental and overriding public interest that has as its ultimate aim the preservation of our country's very existence. See, *e.g.*, Const. Art. I, § 8, cl 12-13; 10 U.S.C. § 503(a); *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003); *United States v. O'Brien*, 371 U.S. 367, 377 (1968). Respondents have so conceded: "There is no question that government's interest in raising an army is important, even compelling . . .; and so, too, we can presume, is its interest in hiring JAG lawyers." Respondents Brief In Opposition to Petition For Certiorari p. 23. For this purpose, as the Third Circuit recognized, "Congress considers access to college and university employment facilities by military

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[3] Overruled on other grounds, *Alexander v. Sandoval*, 532 U.S. 275 (2001).

recruiters to be a matter of paramount importance." *United States v. City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986). In our contemporary world, in which military conduct is microscopically examined in light of international law, treaties, and assertions of human rights abuse, military recruitment of high quality and quantity of lawyers is obviously essential to military performance. Apparently for these reasons, the court below "presume[d] that the Government has a compelling interest in attracting talented military lawyers." *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 234 (3d Cir. 2004).

The court below, however, overrode the undisputed governmental interest in military recruiting, in holding the Solomon Amendment unconstitutional, because it found that conditioning federal funds on equal access for military recruiters violated academic freedom. In fact, the Solomon Amendment works no infringement on academic freedom. To the contrary, its effect is to enhance academic freedom by

inducing institutions of higher learning to allow those students who wish to hear the military message to do so, instead of deterring students from hearing that message because an administration views military policies as politically incorrect.

In the context of respondents' assertion that the Solomon Amendment is unconstitutional because it violates academic freedom, we must look to this Court's expressed definition of academic freedom and of First Amendment free speech. This Court has repeatedly held that the First Amendment insures the right to "'receive information and ideas.'" *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972), quoting from *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). *Accord*, *Board of Education v. Pico*, 457 U.S. 853, 866-67 (1982). This freedom to receive information that a person wishes to hear "is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press and political freedom." *Id.* at 867 (emphasis in original). Further, "[t]his

Court has recognized that this right is 'nowhere more vital' than in our schools and universities." *Kleindienst v. Mandel*, 408 U.S. at 763.

"The college classroom with its surrounding environs is particularly the 'marketplace of ideas,'" which is inherent in "academic freedom." *Healy v. James*, 408 U.S. 169, 180-81 (1972). A marketplace of ideas requires a "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), in part quoting from *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). This aim requires that "students must always remain free to inquire, to study and to evaluate. . . ." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Plaintiffs totally misconceive the concept of "academic freedom" when they assert that it is violated by conditioning receipt of federal funds on allowing military recruiters equal

access to those students who seek to listen to that message. The Court below fallaciously construed academic freedom as the college administration's right to impose its views on the student body, even though various students seek to hear or express contrary views. It is axiomatic that it is the antithesis of academic freedom for one group of students and faculty members (these plaintiffs) to preclude the dissemination of a message that other students wish to hear, merely because these plaintiffs disagree with the message.

The law schools properly proclaim in this lawsuit that they have the duty to protect academic freedom. But they apparently misconstrue academic freedom as primarily for the benefit of administration and faculty, with academic freedom for students restricted through administration-proclaimed self-serving definitions of politically correct and acceptable forms of thought and speech designed to limit free expression on campus. Academic freedom is not the exclusive property of college administrations and some group

of faculty members. Rather, it is the education of students for which colleges exist, with students being the primary beneficiaries of academic freedom. The law school administrations are the fiduciaries of that right, ensuring its implementation for the students' benefit.

This Court in *United States v. American Library Ass'n, Inc.*, 539 U.S. 194 (2003), recognized, in an analogous context, the need to protect the First Amendment rights, not of the institution, but of the patrons of the institution. Rejecting a claim of violation of libraries' First Amendment rights, this Court "assum[ed]" such right, but looked to whether "their patrons' First Amendment rights" had been violated, because they were the ultimate beneficiaries of free speech rights. *Id.* at 214. So too, in the law school context, the students are the ultimate beneficiaries, whose rights are not restricted, but enhanced, by being allowed to hear different employment opportunities.

This Court in *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), emphasized the importance of the administration's role in protecting the academic freedom of students, not of the college administration:

> The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in . . . its college and university campuses.

Id. at 836.

While this Court's decision in *Rosenberger*, which addressed higher education administration restriction of students' right to hear "a diversity of views from" speakers (*id.* at 834), was in the state action context,[4] the reasoning is

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[4] Although a § 1983 cause of action may not be available against non-state schools, the definition of academic freedom in those cases is relevant to determining whether any merit exists to these respondents' assertion that the Solomon Amendment is unconstitutional because it violates their academic freedom. Finding that it did not, under this Court's definitions of academic freedom, would require reversal of the decision below. It hardly needs saying that such finding is not inconsistent with holdings that § 1983, in the context of academic freedom, is limited to state

likewise apt here. There, the university paid for printing costs of student publications, but withheld such payment from one student publication because of the message it communicated, asserting that the University could not permit its association with that message -- just as plaintiffs here assert that the law schools would be associated with the military's message. This Court in *Rosenberger* agreed that, if the student publication's view were attributable in any way to the University, the administration's action in denying funding of the publication would have been upheld. But "[i]t does not follow . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from [different] speakers."

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institutions. In a § 1983 law suit, the plaintiff affirmatively asserts a violation of academic freedom in order to declare the school's conduct to be unconstitutional. Here, no party is seeking to declare any school's conduct to be unconstitutional. Indeed, each school remains free to deny equal access to military recruiters. But, if respondents' assertion that the Solomon Amendment violates their academic freedom is rejected, the Government can continue to withhold federal funds.

Id. Then, in words directly applicable to the instant issue, this Court explained:

> A holding that the University may not discriminate based on the viewpoint of [non-University] persons whose speech it facilitates does not restrict the University's own speech. . . .

Id. at 834. To emphasize that point, this Court stated that the "distinction between the University's own favored message and the private speech of students is evident. . . ." *Id.* That same distinction, between the law schools' message and the private academic freedom rights of students to hear the military's message, is equally evident here.

In holding that, by precluding students from the freedom to choose to listen to the military option, it protected associational freedom, the court below turned that freedom on its head. This Court, in *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), explained that the basis for the freedom of expressive association was to accord "protection to collective effort on behalf of shared goals" in order to

"preserv[e] political and cultural diversity and" to "shield[] dissident expression from suppression by the majority." Here, purportedly in the name of freedom, the court below has allowed law schools to prohibit those students who wish to hear the military message from doing so on campus, because, presumably, the majority do not like that view. Further, no school administration in this country can seriously contend that all students, in enrolling in a college or law school, agree to a specified viewpoint on such subjects as military and sexual orientation policies. There is therefore no signing-on to a "collective effort on behalf of shared goals" on those and other policies on which students may hold divergent views. Indeed, the true shared goals of students in higher education recognize the protection of divergent views, not imposition of views held by a majority. This Court recently emphasized the importance of diversity, not uniformity, of ideas within a student body. *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003). For that purpose, the First Amendment means "that each person should decide for

himself or herself the ideas and beliefs deserving of . . . consideration." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994). The law schools, by seeking to prevent each student from equal access to consider the military's message, are thus in fact denying First Amendment rights to students, and not, as the court below held, protecting against a violation of academic freedom.

Other decisions by this Court support the conclusion that the court below erred in relying on the First Amendment rights of the law school administrations, rather than the academic freedom rights of the students. For example, in *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986), this Court recognized the entity's First Amendment interest as subordinate to that of the entity's "members" in noting that SEC "regulations that limit management's ability to exclude some shareholders' views from corporate communications do not infringe corporate First Amendment rights." *Id.* at 14 n.10. And, in another

analogous context, this Court rejected broadcasters' claim that their First Amendment rights were violated when the FCC required them to allow fair comment by any person attacked by broadcasters, because "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

The decision below must be reversed even if the associational rights of the school administrations, as distinguished from the academic freedom of students, were a determinative consideration. The linchpin of the holding that the Solomon Amendment violated the schools' associational rights is that the presence of military recruiters on campus would communicate the law schools' endorsement of the military's anti-gay policies. This assertion finds no support in the practicalities of campus recruiting. No one assumes that a law school allows recruiters only from employers endorsed by the law school and with whom the law school

and its faculty agree. For example, recruiters may interview on behalf of NOW (pro-abortion) as well as on behalf of an anti-abortion legal group, obviously without the suggestion of endorsement of either position. Similarly, no one would suggest that the law school has incurred liabiiity by endorsing a prospective employer who, after making employment offers, becomes bankrupt before the employment starts, as has occurred, causing financial loss to any student who had accepted employment with that employer.

This Court has previously held in similar circumstances no endorsement of views can be found when an entity gives access to its premises for the expression of a differing view. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court rejected the suggestion that the First Amendment rights of a private shopping center owner could be implicated by being compelled to allow individuals to express themselves on its property through circulation of

petitions. In reasoning equally applicable to law schools having military recruiters present on campus, this Court held:

> The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner. . . . [Also] appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand.

Id. at 87. Likewise here, plaintiffs can disavow any connection with the military recruiters, and have expressly done so, thereby avoiding even a scintilla of association with their views.[5]

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[5] The court below questioned whether "the Solomon Amendment, as recently amended, . . . permit[s] law schools to disclaim the military's message." 390 F.3d at 240-41. That court thus ignored the government's representation to the contrary in its brief below, repeated herein in its petition for certiorari, pp. 14-15, and the many record recitations of law schools, their faculty and student criticism of military policies when military recruiters were on campus. Indeed, the court below admitted that the "record is replete with references to student protesters and public condemnation." 390 F.3d at 245. Given these record references to vocal objections to military policies which have greeted military recruiters, and the absence of any claim that the government threatened loss of federal funding on the basis of such conduct, the Third Circuit's comment is obviously erroneous.

To affirm the lower court's ruling that the academic freedom of law school administrations allows them to bar the expression of a military point of view with which the administrations disagree would open the floodgates of administration censorship of students' freedom to hear and present diverse views.[6] If the military can be banned on the basis of the administration's decision to disassociate from the military's homosexual policy, administration control over student freedom of expression would be unlimited. An administration could reject the military for anti-war or anti-U.S. foreign policy reasons, unrelated to the military's homosexual policy. And depriving students of information would not be limited to the military. An administration could

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[6] We again recognize that non-state schools are not necessarily proscribed from denying academic freedom to their students. But, given the holding by the court below -- that the Solomon Amendment is unconstitutional because it violates academic freedom -- it is necessary to define academic freedom in this context, whether a state or non-state school is involved. There is no basis to define academic freedom of students differently depending upon whether the students attend a state or non-state schools, particularly on the determinative issue here as to whether the Solomon Amendment violates academic freedom.

also, for example, bar campus access to a pro-choice speaker on the ground that the view is immoral as espousing discrimination against unborn babies, or deny access to a pro-life speaker because the view denies women their constitutional rights to decide. Some administrations' attack on Israel as immorally persecuting Palestinians would equally allow barring a speaker on behalf of Israel. Administrations' opposition to "association" with an "unacceptable" view would totally override students' academic freedom rights.

Rejecting law schools' right to bar military recruiters because of the view they represent would not abrogate administrators' ability to exercise appropriate authority over student actions to prevent school disruption. A holding that law schools may not assert a claim to institutional academic freedom to violate students' academic freedom to hear divergent views would have no effect on law schools' continuing right to prevent criminal or other disruptive

conduct by all parts of campus population -- administration, faculty and students. Unlike conduct that higher education administrators have a right to prevent, whether because it is criminal conduct or contrary to campus civility, the military policy on homosexuals (10 U.S.C. § 654) is not only not criminal but has been upheld by the courts. *E.g.*, *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996).

The Court below's reliance on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), is misplaced. The plaintiff in *Hurley* -- a homosexual -- sought to require his participation in an expressive parade limited to those who agree with the sponsor's message, akin to a Republican seeking to require participation in a Democratic Party parade. This Court found that the parade

organization was not "merely 'a conduit' for the speech of participants in the parade," but "'itself a speaker.'" In that parade context, plaintiff's "participation would likely be perceived as having resulted from the [sponsor's] customary determination about a unit admitted to parade, that its message was worthy of presentation and quite possibly of support as well." *Id.* at 575. No such perception is likely here where the purpose of employment fairs is not to convey an overall message, but an opportunity for students to hear the employment opportunities message of each diverse interviewer.

This Court, in *Hurley*, distinguished *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), with language particularly relevant here:

> In *Turner Broadcasting*, we found this problem absent in the cable context, because "[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."

515 U.S. at 576. And,

> Parades and demonstrations, in contrast, are not understood to be so neutrally presented or selectively viewed. Unlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. . . . [T]he parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.

Id. at 576-77.

Akin to programming made available on cable networks, all potential employers, participating in an employment fair, present "individual, unrelated segments that happen to be" made available "for individual selection by members of the audience" -- here, students -- without any single message distilled from the opportunity. There is thus, applying the *Hurley* reasoning, no danger that the law school administrations would be tarred with the views of any single employer interviewer, including the military.

Dale is distinguishable because, unlike here where no special position is given to any one of many recruiters, Dale would have been accorded a special leadership role as assistant scoutmaster, a leadership and role-model position over young scouts, compromising the Boy Scouts' position on homosexuality. Significantly, the four dissenters in *Dale* (Justices Stevens, Souter, Ginsburg and Breyer), while disagreeing as to the scoutmaster's special position, made clear that, here, admitting diverse recruiters would not implicate the law schools' First Amendment rights. To paraphrase those dissenters' view:

> It is not likely that [any law school] would be understood to send any message, . . . simply by admitting someone as a [recruiter]. . . . The notion that an organization of that size and enormous prestige implicitly endorses the views that each of those [recruiters] may express . . . is simply mind boggling.

Dale, 530 U.S. at 697.

Although, as we have shown, the Solomon Amendment works no infringement of First Amendment rights because it enhances students' ability to consider varying messages,

"[e]ven if [the statute] does work some slight infringement on [law schools'] right of expressive association, that infringement is justified because it serves the State's compelling interest. . . ." *Board of Directors of Rotary Int'l v Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). An infringement "may be justified by [statutes and] regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Here, Congress properly found that the military would be hindered in its recruitment efforts if it did not have equal access to students, as part of the single employment program most law schools schedule, in a location (often the law school itself) convenient to all students. Thus, "even if enforcement of the Act causes some incidental abridgement of . . . protected speech, that effect is no greater than necessary to accomplish the [Government's] legitimate purposes," *id.* at 628, and should be allowed. See also *Bob*

Jones University v. United States, 461 U.S. 574 (1983): Burdening colleges' exercise of First Amendment religious liberty rights by withdrawing tax benefits "will inevitably have a substantial impact on the [school's] operation" (*id.* at 603-04), but such "'limitation on religious liberty'" is justified "'by showing that it is essential to accomplish an overriding governmental interest'" (*id.* at 603, quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982)).

The court below faults the government for failing "to produce any evidence that [the Solomon Amendment] is no more than necessary to further the Government's interest." 390 F.3d at 246. The Constitution does not require the government to disprove that other solutions would meet the government's need less restrictively but with equal effectiveness. Otherwise, "the undoubted ability of lawyers and judges," who are not constrained by budgetary worries and other practical parameters within which Congress must operate, "to imagine *some* kind of slightly less drastic or

restrictive an approach would make it impossible to write laws that deal with the harm that called the statute into being." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 841 (2000) (Breyer, J., dissenting) (emphasis in original). *Accord*, *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring): A "judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." The court below improperly ignored these directions against judicial second-guessing of legislative decisions by suggesting alternate solutions for military recruitment needs in "loan repayment programs [or] television and radio advertisements" which the Third Circuit admitted "may be more costly" 390 F.3d at 234. Further, the court below, in suggesting a more costly approach, gives no reason to doubt the intuitive proposition that a program focused on a limited target audience of students already interested at a known time

and location, is more effective than an unfocused general public one.

Conclusion

The Solomon Amendment does not infringe academic freedom. Rather, it enhances academic freedom of students by conditioning the grant of federal funds on permitting students to choose to hear the military recruiter's message. As the decision below depends on an erroneous finding that the Solomon Amendment violates the First Amendment, it should be reversed.

Respectfully submitted,

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Dated: June 6, 2005